

# EXHIBIT B

**SUPREME COURT OF THE STATE OF NEW YORK**  
**COUNTY OF** Kings

-----X  
GABRIEL FRANCIS,

Plaintiff/Petitioner,

- against -

Index No. 506584/2017

BLUESTEM BRANDS INC. *dba* FINGERHUT,

Defendant/Respondent.  
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**NOTICE OF COMMENCEMENT OF ACTION**  
**SUBJECT TO MANDATORY ELECTRONIC FILING**

PLEASE TAKE NOTICE that the matter captioned above has been commenced as an electronically filed case in the New York State Courts Electronic Filing System ("NYSCEF") as required by CPLR § 2111 and Uniform Rule § 202.5-bb (mandatory electronic filing). This notice is being served as required by that rule.

NYSCEF is designed for the electronic filing of documents with the County Clerk and the court and for the electronic service of those documents, court documents, and court notices upon counsel and unrepresented litigants who have consented to electronic filing.

Electronic filing offers significant benefits for attorneys and litigants, permitting papers to be filed with the County Clerk and the court and served on other parties simply, conveniently, and quickly. NYSCEF case documents are filed with the County Clerk and the court by filing on the NYSCEF Website, which can be done at any time of the day or night on any day of the week. The documents are served automatically on all consenting e-filers as soon as the document is uploaded to the website, which sends out an immediate email notification of the filing.

The NYSCEF System charges no fees for filing, serving, or viewing the electronic case record, nor does it charge any fees to print any filed documents. Normal filing fees must be paid, but this can be done on-line.

**Parties represented by an attorney:** An attorney representing a party who is served with this notice must either: 1) immediately record his or her representation within the e-filed matter on the NYSCEF site; or 2) file the Notice of Opt-Out form with the clerk of the court where this action is pending. Exemptions from mandatory e-filing are limited to attorneys who certify in good faith that they lack the computer hardware and/or scanner and/or internet connection or that they lack (along with all employees subject to their direction) the operational knowledge to comply with e-filing requirements. [Section 202.5-bb(e)]

**Parties not represented by an attorney: Unrepresented litigants are exempt from e-filing. They can serve and file documents in paper form and must be served with documents in paper form.** However, an unrepresented litigant may participate in e-filing.

For information on how to participate in e-filing, unrepresented litigants should contact the appropriate clerk in the court where the action was filed or visit [www.nycourts.gov/efile-unrepresented](http://www.nycourts.gov/efile-unrepresented). Unrepresented litigants also are encouraged to visit [www.nycourthelp.gov](http://www.nycourthelp.gov) or contact the Help Center in the court where the action was filed. An unrepresented litigant who consents to e-filing may cease participation at any time. However, the other parties may continue to e-file their court documents in the case.

For additional information about electronic filing and to create a NYSCEF account, visit the NYSCEF website at [www.nycourts.gov/efile](http://www.nycourts.gov/efile) or contact the NYSCEF Resource Center (phone: 646-386-3033; e-mail: [efile@nycourts.gov](mailto:efile@nycourts.gov)).

Dated: APRIL 28, 2017



Signature

EDWARD B. GELLER

Name

EDWARD B. GELLER, ESQ., P.C.

Firm Name

15 LANDING WAY

Address

BRONX, NEW YORK 10464

914-473-6783

Phone

epbh@aol.com

E-Mail

To: BLUESTEM BRANDS INC. <sup>dba</sup> FINGERHUT

6509 FLYING CLOUD

EDEN PRARIE, MN 55344

9/3/15

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

-----  
GABRIEL FRANCIS,

Plaintiff,

Index No. 506584/2017  
AMENDED  
SUMMONS

-against-

BLUESTEM BRANDS INC. d/b/a FINGERHUT,

Defendants.

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To the above named Defendant(s):

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer on the Plaintiff's Attorney(s) within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York). In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

The basis of the venue designated is Plaintiff's address.

Dated: April 3, 2017

Edward B. Geller, Esq., P.C.  
Attorney for Plaintiff  
15 Landing Way  
Bronx, New York 10464  
Tel:(914)473-6783

To: Bluestem Brands Inc. dba Fingerhut  
Defendant  
6509 Flying Cloud  
Eden Prairie, M 55344



**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS**

-----X  
GABRIEL FRANCIS,

Index No.: 506584/2017

Plaintiff,  
-against-

**AMENDED  
COMPLAINT FOR VIOLATIONS  
OF THE TELEPHONE  
CONSUMER PROTECTION ACT**

BLUESTEM BRANDS INC. dba FINGERHUT

Defendant(s).

**DEMAND FOR JURY TRIAL**

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**INTRODUCTION/PRELIMINARY STATEMENT**

Plaintiff GABRIEL FRANCIS ("Plaintiff"), by and through his attorney, M. Harvey Rephen & Associates, P.C.,  
by Edward B. Geller, Esq., P.C., Of Counsel, as and for his Complaint against the  
Defendant BLUESTEM BRANDS INC. dba Fingerhut  
(hereinafter referred to as Defendant(s)), respectfully sets forth,  
complains and alleges, upon  
information and belief, the following:

**INTRODUCTION/PRELIMINARY STATEMENT**

1. Plaintiff brings this action on his own behalf for damages and declaratory  
and injunctive relief arising  
from the Defendant's violation(s) under Title 47 of the United States Code, §227  
commonly known as the

Telephone Consumer Protection Act (TCPA).

2. Defendant is subject to, and required to abide by, the laws of the United States and the State of New York,

which include the Telephone Consumer Protection Act of 1991, 47 U.S.C. §227, et seq. ("TCPA") and its related regulations,

including 47 C.F.R. §64.1200 ("TCPA Regulations"), as well as the opinions, regulations and orders issued by the

Federal Communications Commission to implement and enforce the TCPA, the telemarketing regulations issued by the

Federal Trade Commission, 16 C.F.R. §310.4(d)(2).

### **PARTIES**

3. Plaintiff GABRIEL FRANCIS is a resident of the State of New York, residing at 178 Lott Street,

Brooklyn, NY 11226.

4. Defendant (s), BLUESTEM BRANDS INC. <sup>dba</sup> FINGERHUT has a Corporate Headquarters located

at 6509 FLYING CLOUD, EDEN PRAIRIE, MN 55344.

5. The within causes of action arose in the County of Kings, State of New York.

### **FACTUAL ALLEGATIONS**

6. Plaintiff repeats, reiterates and incorporates the allegations contained in paragraphs numbered "1" through "5"

herein with the same force and effect as if the same were set forth at length herein.

7. On or about August 20<sup>th</sup> 2016, Defendant began communicating with the Plaintiff by placing autodialed calls to the Plaintiff's cell phone number of 518-788-4066 almost on a daily basis. The calls being placed to the Plaintiff's cell were intended for another person.

8. On September 12<sup>th</sup> 2016 the Defendant called the Plaintiff from (866) 625-7291 twice in one day, once at 12:50pm then again at 8:50pm.

9. Since the start of the calls there has been at least 150 calls made to the plaintiff.

**FIRST CAUSE OF ACTION**  
***(Violations of the TCPA)***

10. Plaintiff repeats, reiterates and incorporates the allegations contained in paragraphs numbered "1" through "9" herein with the same force and effect as if the same were set forth at length herein.

11. According to the Telephone Consumer Protection Act 47 USC §227(b)(A)(iii), "It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States (A) to make any call (other than a call made for emergency purposes or made with the prior consent of the called party) using any automatic telephone dialing system or an artificial or pre-recorded voice--- (iii) to any telephone number assigned to a paging service, cellular telephone



service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call, unless such call is made solely to collect a debt owed to or guaranteed by the United States.”

12. It has been determined that the statute language adding “or” any service for which the called party is charged, is not accurately interpreted to require that Plaintiff must claim that Defendant’s calls incurred charges.

See Breslow v. Wells Fargo Bank, N.A. 857 F. Supp 2d 1316, 1319 (S.D. Fla. 2012) and Cavero v. Franklin Collection Serv., Inc.,

2012 WL 279448 (S.D. Fla. 2012). A number of Courts have addressed the issue of a Plaintiff being charged with all agreeing that the

TCPA does not require a Plaintiff who received calls on his/her *cell phone* to allege that he/she was charged for the call.

For example, in Manno v. Healthcare Revenue Recovery Grp., LLC, 289 F.R.D. 674 (S.D. Fla. 2013), the Court held that “The TCPA

does not require the plaintiff to be ‘charged for’ the calls in order to have standing to sue.” In Osorio v. State Farm Bank, F.S.B.,

746 F.3d 1242 (11<sup>th</sup> Cir. 2014), the Court stated: If the phrase ‘any service for which the called party is charged for the call’ requires

that the party be charged per call for the ‘paging service, cellular telephone service, specialized mobile radio service, or other radio



common carrier service' in order for the party to prohibit autodialed calls, then the listing of these services would be superfluous because they are already included under them 'any service for which the called party is charged.' On the other hand, reading 'any service for which the called party is charged for the call' as an additional item beyond any call to a 'paging service, cellular telephone service, specialized mobile radio service, or other common carrier service,' regardless of whether the called party is charged, gives independent meaning to each term."

13. It is thus clear from the plain language of the TCPA, and its considerable body of resultant case law that the TCPA is violated when a cellular telephone is called with an automatic dialer without consent, even if no charges are alleged or incurred.

14. With the autodialed calls to Plaintiff's telephone commencing on or about August 2016 and continuing at a rate of approximately (150) times thereafter, the Defendant violated various provisions of the TCPA, including but not limited to 47 USC §227(b)(A)(iii).

15. Pursuant to the TCPA Omnibus Declaratory Ruling and Order, July 2015, paragraphs 138 and 139, communications from banking institutions which are exempt "...are all intended to address exigent circumstances in which a quick, timely

communication with a consumer could prevent considerable consumer harms from occurring or, in the case of the remediation calls, could help quickly mitigate the extent of harm that will occur.” Pursuant to Paragraph 139, (3) and (7) “In light of these considerations, we adopt the following conditions for each exempted call (voice call or text message) made by a financial institution:

3) voice calls and text messages are strictly limited to purposes discussed in paras. 129-137 above and must not include any telemarketing, cross-marketing, solicitation, debt collection, or advertising content; 7) a financial institution must honor opt-out requests immediately.”

16. Defendant is in violation of the TCPA paragraphs 139 (3) for, upon information and belief, having used their calls for debt collection and (7), failing to honor Plaintiffs’ desire to opt out of telephone communications despite Plaintiff’s clear, unequivocal and repeated requests that such automatic calls cease.

17. Defendant violated various provisions of the TCPA, including but not limited to 47 USC §227(b)(A)(iii).

### **PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff demands judgment from the Defendant as follows:

A. For trebled damages to be awarded to the Plaintiff in accordance with the TCPA, for each of the Defendant’s

willful or knowing violations of the TCPA, in the amount of \$225,000.00;

B. A declaration that the Defendant's practices violated the TCPA;

C. For any such other and further relief, as well as further costs, expenses and disbursements of this action, as this Court may deem just and proper.

Dated: April 3, 2017

Respectfully submitted,



EDWARD B. GELLER, ESQ.

EDWARD B. GELLER, ESQ., P.C., OF COUNSEL

TO

M. HARVEY REPHEN & ASSOCIATES, P.C.  
15 LANDING WAY  
BRONX, NEW YORK 10464  
TEL:(914)473-6783

*Attorney for the Plaintiffs'*  
GABRIEL FRANCIS

To: BLUESTEM BRANDS INC. <sup>abc</sup> FINGERHUT  
6509 FLYING CLOUD  
EDEN PRAIRIE, MN 555344

# COMPLAINT

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Edward B. Geller, Esq., P.C., Of Counsel to  
*M. HARVEY REPHEN & ASSOCIATES, P.C.*  
15 Landing Way  
Bronx, New York 10464  
Phone: (914)473-6783



### ATTORNEY AFFIRMATION

I, the undersigned, an attorney admitted to practice in the courts of New York State, state that I am the attorney of record for Plaintiff Gabriel Francis in the within action. I have read the foregoing Summons and Complaint and same is true to my own knowledge, except as to the matters stated to be alleged on information and belief, and as to those matters I believe it to be true, and the reason this Affirmation is made by deponent and not by the Plaintiff is because records belonging to Plaintiff are in my possession. The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are communications with the Plaintiff and copies of Plaintiff's records in my possession.

I affirm that the foregoing statements are true, under the penalty of perjury.

Dated: April 28, 2017



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Edward B. Geller, Esq.

Edward B. Geller, Esq., P.C.